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December 14, 2006

Via Telecopier at (202) 632-7066 and e-mail

Hon. Philip N. Hogen, Chairman
National Indian Gaming Commission
1441 L. Street, N.W.
Washington, District of Columbia 20005

Re: Comments on Draft Class II Game Classification Regulations and Economic Impact Study

Dear Chairman Hogen:

Forman & Associates, Attorneys at Law, is legal counsel to the Morongo Band of Mission Indians ("Morongo") in matters pertaining to gaming. Morongo currently operates both Class II and Class III tribal government gaming facilities on its Indian lands in the State of California. As documented in study of the potential economic impact of the new Class II regulations that the National Indian Gaming Commission ("NIGC") has proposed, Morongo operates a substantial number of electronically-aided Class II games to supplement the maximum number of Class III devices that the Tribe may operate under its current Class III compact with the State of California. We are submitting the comments that follow on the Tribe's behalf.

INTRODUCTION

As a threshold matter, Morongo understands, respects and appreciates the technical, political and logistical challenges that confront the NIGC in undertaking the development of regulations that are to have nationwide application, and the substantial amount of time that the NIGC has invested in attempting to devise a set of regulations that will comport with the intent of IGRA, meet tribes' need for viable Class II games and provide reliable guidance for both tribal gaming agencies and game developers in distinguishing between Class III gaming devices or facsimiles of games of chance and technologically-aided Class II games. Nonetheless, Morongo has been forced to conclude that the NIGC's proposed regulations remain deeply flawed, in that they are inconsistent with IGRA as interpreted by controlling decisions of the federal courts, and would impose such draconian restrictions on game architecture and rate of play that games compliant with the proposed regulations would not be economically viable, and thus would be useless to most tribes.

Perhaps unique among tribes operating Class II games, Morongo has had considerable actual operating experience with electronically-aided Class II games that more closely comply with the NIGC's proposed Class II regulations than most other games currently in operation throughout Indian country. Based upon Morongo's experience, we can say with more certainty than most that the study commissioned by the NIGC to assess the probable economic impact of implementing the proposed regulations substantially understates the negative impact that the NIGC's proposed game classification regulations would have on the ability of tribes to use these games to attain IGRA's objective of economic self-sufficiency. If the NIGC's regulations were adopted as proposed, electronically aided Class II games very likely would cease to be either a viable alternative for tribes that cannot engage in Class III gaming, or a meaningful supplement to Class III games for tribes with compacts that cannot operate additional Class III games.

Morongo's comments are set forth in three parts. This letter sets forth in summary form Morongo's objections to the process through which the proposed regulations have been developed, and the legal infirmities of the proposed regulations. Specific comments and suggestions concerning the proposed regulations and the economic impact study are marked on the copies of those documents submitted with this letter.

I. COMMENTS ON PROMULGATION PROCEDURE

Although the NIGC appointed an advisory committee to provide input into the proposed regulations, and conducted several regional meetings at which interested tribes could offer comments, the core concerns and objections that tribes have expressed regarding the NIGC's proposed regulations appear largely to have been ignored as not consistent with what the NIGC intends that its proposed regulations are to accomplish. Thus, the "Advisory Committee" process adopted by the NIGC for the Proposed Regulations has violated the NIGC's own consultation policy. Expecting a few regional tribal representatives to serve as the sole means of consultation with tribal governments is not an acceptable substitute for the NIGC's own obligation to directly consult with affected tribal governments on a government-to-government basis. That process may be time-consuming, but the consequences of the NIGC's proposed action is of such magnitude that the effort would be amply justified, and a process of genuine consultation would give the Proposed Regulations considerably more legitimacy. The process adopted by the NIGC for the Advisory Committee itself should be revised through meaningful consultation with tribal governments.

A major stumbling block in defining the scope of electronically aided Class II gaming has not been the NIGC's existing regulations, but its practice of declining to provide classification decisions in a form that is subject to judicial review. Issuing "advisory opinions" that the federal courts have held lack the force of law and that, when challenged, are described by the NIGC as not being final agency action subject to judicial review, has thwarted the realization of the full potential of electronically aided Class II gaming.

From Morongo's perspective, defining the boundary between an electronically-aided Class II game and a Class III slot machine or facsimile of a game of chance should not require anything more than the NIGC already has incorporated into its existing regulations, because the

focus of the definition should be on the game itself, not the technology with which the game is aided. As was pointed out to the NIGC in a meeting in Palm Springs, California in 2005, customers have no trouble telling the difference between stand-alone Class III games and technologically aided Class II games. Therefore, the NIGC's voluminous proposed detailed regulations not only are unnecessary, but actually would prove to be counterproductive.

II. COMMENTS ON LEGALITY OF THE PROPOSED REGULATIONS

The federal courts have held that "IGRA's three explicit criteria . . . constitute the sole legal requirements for a game to count as class II bingo."¹ The courts have also recognized that Congress intended that class II bingo-related gaming constitute a class or set of games,² and that technology may be used will in *all* class II bingo-related gaming.³ Basically, the proposed regulations appear to be attempting to implement the very sorts of additional restrictions on the definition of Class II games that the federal courts have held are not permitted under IGRA. To that extent, the proposed regulations would likely be subject to successful legal challenge, during which existing uncertainties about proper Class II game classification would remain unresolved.

Morongo believes that the following aspects of the proposed regulations render them not only ill-advised, but extremely vulnerable to legal challenge:

- a) **The Proposed Regulations violate Morongo's retained inherent sovereignty.** The Proposed Regulations go far beyond what is necessary to properly define electronic, computer and other technologic aids to Class II gaming, or to protect the integrity of such games, thereby impermissibly intruding on tribal sovereign decision-making authority that remains unextinguished and undiminished.

¹ *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1096 (9th Cir. 2000) (noting "There would have been no point to Congress's putting the three very specific factors in the statute if there were also other, implicit criteria . . . The three included in the statute are in no way arcane if one knows anything about bingo, so why would Congress have included them if they were not meant to be exclusive?").

² "IGRA includes within its definition of bingo 'pull tabs, . . . punchboards, tip jars, [and] instant bingo . . . [if played in the same location as the game commonly known as bingo]' . . . none of which are similar to the traditional numbered ball, multi-player, card-based game we played as children." *103 Electronic Gambling Devices*, *supra*, 223 F.3d 1091, 1096; *Oneida Tribe of Indians of Wisconsin v. Wisconsin*, 951 F.2d 757, 763 (7th Cir. 1991) ("Although not all the games named in §2703 (7)(A) may be bingo-like, either physically or procedurally, clearly the emphasis is bingo").

³ *Seneca-Cayuga Tribe of Oklahoma v. NIGC*, *supra*, 327 F.3d 1019, 1032 (10th Cir. 2003) ("IGRA further provides that 'electronic, computer, or other technologic aids' to such games are class II gaming, and therefore permitted in Indian Country" and ". . . through IGRA, Congress specifically and affirmatively authorized the use of class II technologic aids . . ."); *See Diamond Games Enterprises v. Reno*, 230 F.3d 365 (D.C. Cir. 200) (holding that an electromechanical dispenser of pull-tabs is a permitted class II aid); *cf. United States v. Santee Sioux Tribe of Nebraska*, 324 F.3d 607, 613 (8th Cir. 2003) (noting that "we believe that the phrase 'whether or not electronic, computer, or other technologic aids are used in connection therewith' applies only to bingo," but concluding that "nothing in the statute proscribes the use of technologic aids for any games, so long as the resulting exercise falls short of being a facsimile"), *cert. denied*, ___ U.S. ___, 124 S.Ct. 1506 (2004).

- b) **The Proposed Regulations will significantly – and needlessly -- disadvantage Morongo and other tribes in dealing with states.** The Proposed Regulations impermissibly alter the jurisdictional relationship between tribes and states provided for by Congress in the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. §§2701-2721. The Proposed Regulations fail to consider the effects of agreements and understandings reached between tribes and states on game classification. The jurisdictional framework between tribes and states provided by the Congress in IGRA has already been made precarious by the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). Moreover, to the extent that the Proposed Regulations too narrowly circumscribe the electronic, computer and other technologic aids to Class II gaming available to tribes, tribes that face state intransigence or overreaching in compact negotiations will be deprived of their right to utilize gaming for the governmental purposes contemplated by IGRA. Bringing the states into the game classification process will complicate and prolong that process, and would create a potential for inconsistent results in different jurisdictions.
- c) **The Proposed Regulations violate IGRA as interpreted by the federal courts.** The Proposed Regulations arbitrarily limit the games and technology that Congress has authorized for play on Indian lands as Class II gaming. In light of IGRA’s legislative history and its interpretation by the federal courts, the purported areas of ambiguity on which the NIGC has apparently based its intention to adopt the Proposed Regulations simply do not exist.
- d) **The Proposed Regulations include requirements with which no current games comply, and with which compliance may be impossible or economically unfeasible.** The Proposed Regulations are design- or implementation- specific, and are unduly restrictive. Congress intended in IGRA that tribes have “the opportunity to take advantage of modern methods of conducting Class II games and the language regarding technology is designed to provide maximum flexibility.” See S.Rep. No. 446, 100th Cong., 2d Sess., reprinted in 1988 U.S. Code Cong. & Ad. News 3071, 3079 (*hereinafter*, the “Senate Report”). The Proposed Regulations do not reflect the growth and innovation of Class II gaming technology in the play of bingo and games similar to bingo, and thus are likely to prove unworkable, now and over time.
- e) **The Proposed Regulations will contribute to uncertainty in tribal gaming regulation, rather than helping to resolve uncertainty.** Tribes have been successfully regulating gaming operations for more than twenty years, since before IGRA took effect. The Proposed Regulations directly conflict with prior NIGC decisions and actions on which tribal gaming regulators have relied, and upon which tribal governments have based significant investment decisions. The Proposed Regulations will significantly undermine prior decisions and precedents by tribal agencies. The Proposed Regulations are likely to be in direct conflict with numerous tribal gaming ordinances or resolutions that have been approved by the Chairman of the NIGC pursuant to 25 U.S.C. §2710(b)(2).

- f) **The Proposed Regulations will not serve the purported purpose of providing certainty for tribal governments and others as to the position of the federal government on the scope of lawful Class II gaming.** Under the Proposed Regulations, neither the NIGC nor other agencies of the federal government would be bound by any game classification made by the NIGC, in part because the U.S. Department of Justice has not been involved in the promulgation process and has not agreed to accept the Proposed Regulations as binding and definitive. Therefore, tribes and vendors could incur enormous expense in complying with the Proposed Regulations, experience significant loss of revenues, and still end up litigating the status of games with the Department of Justice.
- g) **The NIGC already has ample oversight control over the tribal regulation and operation of Class II gaming.** The Proposed Regulations are not necessary for the proper performance of the functions of the NIGC, and the information sought from tribes under the Proposed Regulations thus lacks practical utility. There is no need for the NIGC to infringe on the decision-making authority of tribal governments by adopting the Proposed Regulations.
- h) **Prizes.** IGRA specifies only that a game of bingo must be played for prizes. The NIGC should avoid placing restrictions on either the amount or type of prizes that can be offered in a game. Features such as these, rather than having regulatory or definitional significance, are marketing decisions. Therefore, all such provisions should be removed from the current draft.
- i) **Bingo Cards.** IGRA requires only that bingo be played with cards, but the NIGC is now attempting to regulate all facets of a bingo card, including both its size and number of squares. Requiring that a bingo card contain 25 squares, and that each square measure 1 centimeter by 1 centimeter, has no legal support or other justification, and serves only to limit the “flexibility” that Congress so clearly intended. It also reverses existing NIGC guidance that allows cards with only four squares and measure 2½ inches square. The NIGC should return to its existing standard that a bingo card must be “readily visible.”
- j) **Timing of Card Selection.** The latest draft also states that a player must not be able to obtain a new card once game play begins, nor be able to join a game in progress. These requirements are arbitrary and lack reasonable justification, because no such restrictions are imposed upon bingo games played on paper or cards. Such restrictions lack support in either IGRA or court decisions, and are in direct conflict with long-established games such as Bonanza Bingo.
- k) **Auto-Daub.** IGRA expressly authorizes the use of technologic aids in the play of class II games. “Auto-daub” epitomizes such an aid, as it assists a player in covering the numbers on their cards during the game’s natural progression. It is particularly relevant that the courts have held that the manner in which a player covers their card(s) is irrelevant, and that bingo card minders have been in use in bingo halls nationwide for many years. The NIGC’s attempt to roll back and prohibit this advancement in technology is without legal support. The NIGC should not attempt to prohibit bingo minders simply to buttress the NIGC’s argument against auto-daub.

l. **Bingo Ball Draw.** The NIGC's persistence in contending that balls must be released to players "in close proximity" to the time at which they were generated also lacks legal support. Games such as Bonanza Bingo played with so-called "pre-drawn balls," predate IGRA, and there is no basis for believing that Congress intended to limit or eliminate such games. These provisions should be deleted from the draft rule.

m. **Multiple Ball Releases.** While the NIGC has previously argued that a game of bingo cannot be won after only one release of balls, the current draft extends this requirement to the interim portions of a game of bingo. Doing so violates the holdings of the Ninth and Tenth Circuit Courts of Appeal in the *MegaMania* cases, and thus these portions of the proposed rule should be deleted.

n. **Differing Eligibility to Cover Interim Prizewinning Patterns.** Nothing in IGRA's definition of "bingo" prohibits players who are competing for the same *game-winning* pattern from competing for different *interim* prize-winning patterns, and these different opportunities are critical to the economic viability of technologically aided Class II games. Players in a class II game may participate at different levels. As the courts have held, the proper focus of a game classification analysis is whether the game "as a whole" meets the three statutory requirements of bingo – not one of its constituent parts. To do otherwise is to add a limitation upon the game not envisioned by Congress. That the NIGC may have imposed this restriction on some tribes or vendors should not serve as a boot-strap justification for imposing it on others in the purported interest of "fairness." The fair process would be to eliminate this requirement for all. Therefore, this aspect of the proposed rule should be deleted.

o. **House Banking.** Unlike traditional house banked games such as blackjack, in bingo and games similar to bingo, the house is not a participant in the game. At no time does the house have its own card, nor does it take on or compete against the game's players. Thus, the house has no interest in whether or by whom the game is won. The NIGC should avoid interpreting "house banked" as something other than the way in which it is defined by the NIGC's own definitional regulations, and certainly should avoid applying a definition that conflicts with case law. Both the Ninth and Tenth Circuit Courts of Appeal have held that the fact that the house retains a percentage of the amount wagered does not make a game "house banked" as that term is defined by the NIGC. The current definition is sufficient, and should not be changed.

p. **Broadening Participation.** Contrary to the latest draft, nothing in IGRA requires technologic aids to uniformly broaden participation. Thus, requirements such as those calling for a minimum of either six players in every game or a delay of two seconds between games should not be placed upon any bingo game, nor, in a pull-tab game, should there be a requirement of simultaneous participation by multiple players as long as all players are competing for the finite number of prize-winning tickets in a finite deal. Instead, the sole focus should be upon ensuring that a player cannot play alone against a machine, a standard that is satisfied simply by requiring the participation of at least two players for bingo, and competition among all players for the same pre-determined prize-winning tickets in a finite pull-tab deal.

q. **Tangible Pull-Tabs Are Not Required.** The current draft requires the use of “tangible” or paper pull-tabs when the game of pull-tabs is played with electronic equipment. The NIGC bases this requirement on some early cases involving self-contained facsimiles of the game; those cases that are now stale and of significantly diminished value as precedent, particularly if the player terminals in a game are linked to a central server. Those cases involved older technologies. New technologies are available and have been implemented that allow the play of electronic pull-tab games with technologic aids as class II gaming under the rationale of the decisions by the Ninth and Tenth Circuit Court of Appeals in the *MegaMania* litigation. The requirement of a tangible medium is not supported by either the IGRA or recent court decisions, and should be removed from the proposed rule as a significant and needless impediment to the realization of the full potential of aided Class II gaming.

r. **The Johnson Act Should Not Be Part of Game Classification Analysis under IGRA.** The NIGC’s 2002 rulemaking, supported by the decisions of federal appeals courts, removed the Johnson Act as a factor to be considered in the classification of games under IGRA. To avoid any confusion based upon our other comments herein, a game classification analysis should begin with determining whether the game is a class II game, and, if the game uses technology does the technology function as an aid or does the technology constitute a facsimile or a slot machine; at that point, the analysis should end. To then evaluate whether the equipment also may fall within the Johnson Act definition of a “gambling device” would be contrary to judicial holdings and the IGRA.

In the eighteen years since the enactment of IGRA, the NIGC twice has adopted definitional regulations, first in 1992, and again in 2002. The federal courts have on several occasions addressed and clarified the distinctions between Class II bingo-related games and Class III lottery games and also between Class II technologic aids and Class III facsimiles and slot machines. Tribes and others have made and continue to make substantial investments in reliance of these earlier actions and decisions. Not only are these investments threatened by the uncertainty surrounding and created by NIGC’s current rulemaking process, but also the Proposed Regulations would make it more difficult for tribal gaming agencies timely and definitively to determine what new games should or can be implemented. Important trust responsibilities would be violated by implementing the Proposed Regulations in their current form.

Congress intended in IGRA that tribes have “maximum flexibility” to utilize Class II gaming for purposes of tribal economic development, tribal self-sufficiency, and strong tribal government. Congress was well aware that games and technology would evolve. Congress clearly intended that Class II gaming be permitted to grow and evolve with changes in games and technology. The NIGC’s current rulemaking conflicts with Congress’ intent and threatens the stability of all tribal government gaming.

In summary, although the Proposed Regulations have evolved from earlier drafts, many of the comments that we submitted in response to those drafts are equally applicable to the current Proposed Regulations, and therefore we incorporate those comments herein by this reference to the extent that the Proposed Regulations have not changed from earlier drafts. Our

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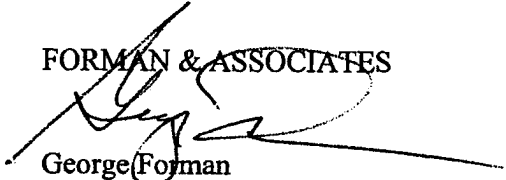
other comments are marked on the copy of the Proposed Regulations and the Economic Impact Study submitted herewith.

Unfortunately, the Proposed Regulations appear to Morongo to be yet another unacceptable, overreaching attempt -- however well intentioned -- to limit the ability of tribal governments, recognized by Congress as having "the exclusive right to regulate gaming on Indian lands," to speak for and to regulate the affairs of their own people.

Morongo stands ready to consult and work with the NIGC to develop Class II Game Classification and Technical Standards regulations that are lawful, workable and economically viable. Thank you for considering these comments and suggestions.

Very truly yours,

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PART 502--DEFINITIONS OF THIS CHAPTER

1. The authority citation for part 502 continues to read as follows:

Authority: 25 U.S.C. 2071 et seq.

2. Revise Sec. 502.8 to read as follows:

Sec. 502.8 Electronic or electromechanical facsimile.

(a) Electronic or electromechanical facsimile means a game played in an electronic or electromechanical format that replicates a game of chance by incorporating the fundamental characteristics of the game.

(b) Bingo, lotto, and other games similar to bingo are facsimiles when:

(1) The electronic or electromechanical format replicates a game of chance by incorporating the fundamental characteristics of the game, and

(2) An element of the game's format allows players to play with or against a machine rather than broadening participation among competing players.

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2. Amend Sec. 502.8 by adding paragraph (c) to read as follows:

Sec. 502.8 Electronic or electromechanical facsimile.

(c) Bingo, lotto, other games similar to bingo, pull tabs, and instant bingo games that comply with Part 546 of this chapter are not electronic or electromechanical facsimiles of any game of chance.

3. Revise Sec. 502.9 to read as follows:

Sec. 502.9 Other games similar to bingo.

Other games similar to bingo means any game played in the same location as bingo (as defined in 25 U.S.C. 2703(7)(A)(i)) that constitutes a variant on the game of bingo, provided that such game requires players to compete against each other for a common prize or prizes.

4. Add a new part 546 to read as follows:

PART 546--CLASSIFICATION STANDARDS FOR BINGO, LOTTO,
OTHER GAMES
SIMILAR TO BINGO, PULL TABS AND INSTANT BINGO AS CLASS II
GAMING
WHEN PLAYED THROUGH AN ELECTRONIC MEDIUM USING
ELECTRONIC,
COMPUTER, OR OTHER TECHNOLOGIC AIDS

Sec.

546.1 What is the purpose of this part?

546.2 What is the scope of this part?

546.3 What are the definitions for this part?

546.4 What are the criteria for meeting the first statutory requirement that the game of bingo, lotto, or other games similar to bingo be "played for prizes, including monetary prizes, with cards bearing numbers or other designations?"

546.5 What are the criteria for meeting the second statutory requirement that bingo, lotto, or other games similar to bingo be one "in which the holder of the card covers such numbers or other designations when objects similarly numbered or designated are drawn or electronically determined?"

546.6 What are the criteria for meeting the third statutory requirement that bingo, lotto, or other games similar to bingo be "won by the first person covering a previously designated arrangement of numbers or designations on such cards?"

546.7 What are the criteria for meeting statutory requirement that Class II pull-tabs or instant bingo not be "electronic or electromechanical facsimiles?"

546.8 When is a pull tab or instant bingo game an "electronic or electromechanical facsimile?"

546.9 What is the process for approval, introduction, and verification of "electronic, computer, or other technologic aids" under the classification standards established by this part?

546.10 What are the steps for a compliance program administered by a tribal gaming regulatory authority to ensure that "electronic, computer, or other technologic aids" in play in Class II tribal gaming facilities meet the classification standards of this part?

Authority: 25 U.S.C. 2701 et seq.

Sec. 546.1 What is the purpose of this part?

This part clarifies the terms Congress used to define Class II gaming under the Indian Gaming Regulatory Act, 25 U.S.C. 2701, et seq. (IGRA or "Act"). Specifically, this part explains the criteria for

determining whether a game of bingo or lotto, any "other game similar to bingo," or a game of pull-tabs or "instant bingo," meets the statutory requirements when these games are played primarily through an "electronic, computer or other technologic aid." This part also establishes a process for establishing Class II certification of "electronic, computer, or other technologic aids" and the games they facilitate. These standards for classification are intended to ensure that Class II gaming using "electronic, computer, or other technologic aids" can be distinguished from forms of Class III gaming that employ "electronic or electromechanical facsimiles" of a game of chance or slot machines.

Sec. 546.2 What is the scope of this part?

This part is intended to address only games played with electronic components. It does not address live session bingo unless that game is played exclusively through electronic components.

Sec. 546.3 What are the definitions for this part?

(a) What is a "game" of bingo or other game similar to bingo? A "game" of the "game of chance commonly known as bingo" or an "other game similar to bingo" consists of the random draw or electronic determination and release of numbers or other designations necessary to form the pre-designated game-winning pattern on a card held by the winning player and the participation of competing players to cover (daub) the numbers or other designations which appear on their card(s) when the selected numbers or other designations are released for play. A "game" ends when a participating player(s) claims the win after obtaining and covering (daubing) the pre-designated game-winning pattern and consolation prizes, if any, are awarded in the game.

(b) What is "Lotto"? The term "Lotto" means a game of chance played in the same manner as the game of chance commonly known as bingo.

(c) What is a "bonus prize" in the game commonly known as bingo or other game similar to bingo? A bonus prize is a prize awarded in a game in addition to the game-winning prize. The prize may be based on different pre-designated and pre-announced patterns than the game-winning pattern, may be based on achieving a winning pattern in a specified quantity of numbers or designations drawn or electronically determined and released, or a combination of these conditions. A bonus prize may be awarded as an "interim prize" while players are competing for the game-winning prize or as a "consolation prize" after a player has won the game-winning prize.

(d) What is a "progressive prize" in the game commonly known as bingo? A progressive prize is an established prize for a game, funded by a percentage of each player's buy-in or wager, that is awarded to a player for obtaining a specified pre-designated and pre-announced pattern within a specified quantity of numbers or designations randomly drawn and released or electronically determined, or randomly drawn and released or electronically determined in a specified sequence. If the progressive prize is not won in a particular game, the prize must be rolled over to each subsequent game until it is won. The progressive prize is thus increased from one game to the next based on player buy-in or wager contributions from each qualifying game played in which the prize is not won. All contributions to the progressive prize jackpot must be awarded to the players. A winning pattern for a progressive prize is not necessarily the same as the game-winning prize pattern.

(e) What does it mean to "sleep" in the game of bingo or an "other game similar to bingo"? To "sleep" or to "sleep a bingo" means that a player fails, within the time allowed by the game:

(1) to cover (daub) the previously released numbers or other designations on that player's card(s) constituting a game-winning pattern or other pre-designated winning pattern; or

(2) to claim the prize to which the player is entitled, having covered (daubed) a previously designated game-winning pattern or other winning pattern, thereby resulting in the forfeiture of the prize to which the player would otherwise be entitled.

(f) What is the "game of pull-tabs"? In the game of pull-tabs, players purchase cards from a set of cards known as the "deal." Each deal contains a finite number of pull-tab cards that includes a pre-determined number of winning cards. Each individual pull-tab within a deal is a paper or other tangible or electronic card with hidden or covered symbols. When those symbols are revealed, there is an arrangement of numbers or symbols indicating whether the player has won a prize. Winning cards with pre-established prizes are randomly spaced within the deal. One deal consists of all of the pull-tabs in a given game that could be purchased.

(g) What is an "electronic pull-tab"? An electronic pull-tab is an electronic image of a pull-tab that is displayed on a video screen.

(h) What is "instant bingo"? In "instant bingo," a player purchases a card containing a pre-selected group of numbers or designations; the winning cards are those in which the pre-selected group of numbers or designations on the card matches the preprinted winning arrangement indicated elsewhere on the card. The game is functionally the same as pull-tabs.

Comment: The order in which cards are dispensed need not be pre-arranged, as long as each sold card is removed from the deal.

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Sec. 546.4 What are the criteria for meeting the first statutory

requirement, as stated at 25 U.S.C. 2703 (7)(A)(i)(I), that the game of bingo, lotto, or other games similar to bingo be played for prizes, including monetary prizes, with cards bearing numbers or other designations?

(a) Each player in the game must play with one or more cards. Except in "instant bingo", each player in the game must obtain the card or cards to be used by that player in the game before numbers or other designations for the game are randomly drawn or electronically determined. Players cannot change cards once play of a particular bingo game has commenced. Electronic cards are permissible.

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(b) Electronic cards in use by a player must be displayed prominently on a video screen of the electronic player station utilized by the player and must be clearly visible to that player at all times during game play. If multiple electronic cards are used by a player, the game must offer the player the capability of seeing each one of his or her cards. At the conclusion of the game, each player must see his or her card with the highest value prize or, if no prize was won, the card closest to a bingo win. At no time shall an electronic card measure less than 2 (two) inches by two (2) inches or four (4) square inches if other than a square card is used.

(c) For a game of bingo, each card must contain a five (5) by five (5) grid of spaces. Each space will contain a unique number or other designation which may not appear twice on the same card. The card may contain one "free space" without a specified number or other designation, provided the free space is in the same location on every card in play or available to be played in the game.

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(d) Each technologic aid other than an auto-dauber used in a live session of bingo shall prominently display on either the cabinet or on the video screen, if any, the following message: "THIS IS A GAME OF BINGO" or "THIS IS A GAME SIMILAR TO BINGO."

(e) As a variant of bingo, in an other game similar to bingo, each card must contain at least three (3) equally sized spaces. Each space will contain a unique number or other designation which may not appear twice on the same card. One space may be designated a "free space" provided the card has at least three (3) other spaces.

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(f) When a number or other designation is covered, the covering must be indicated on the card by a change in the color of the space, a strike-out through the space, or some other readily apparent visual means.

(g) All prizes in the game, except for progressive prizes, must be fixed in amount or established by formula and disclosed to all participating players in the game.

(h) Other patterns may be designated for the award of bonus prizes in addition to the prize to be awarded based on the game-winning

Deleted: Random or unpredictable prizes are not permitted.

pattern. Each such designated pattern or arrangement must also be disclosed to the players upon request before the game begins.

(i) The designated winning patterns and the prizes available must be explained in the rules of the game, which must be made available to the players upon request.

(j) Each game must have a winning player and a game-winning prize must be awarded in every game, provided that if the prize is not timely claimed by the player(s) entitled to claim it, the prize may be rolled over to succeeding games. The pattern designated as the game-winning pattern does not need to pay the highest prize available in the game. A game-winning prize may be less than the amount wagered, provided that the prize is no less than one cent.

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wagered by
the player on each card and at least

(k) A bonus prize in a game that is designated as an "interim prize" must be awarded in a random draw or electronic determination and release of numbers or other designations that is no more than the exact quantity of numbers or designations that are needed for the game-winning player to achieve the game-winning pattern.

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(l) A bonus prize in a game that is designated as a "consolation prize" may be awarded after the game-winning pattern is achieved and claimed by a player but only after a subsequent release of randomly drawn or electronically determined numbers or other designations has been made.

(m) A progressive prize may be awarded only if the game also provides a game-winning prize as described elsewhere in this Part.

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(n) All prizes in a game, including progressive prizes, must be awarded based on the outcome of the game of bingo and may not be based on events outside the selection and covering of numbers or other designations used to determine the winner in the game and the action of the competing players to cover the pre-designated winning patterns. The prize structure must not rely on an additional element of chance other than the play of bingo. However, nothing herein prohibits the operator of a bingo game from awarding prizes or incentives to all participating players independent of the outcome of a game.

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(o) A player station may offer an alternative display of the results of the game in addition to the display of the game results on the electronic bingo card, provided that the player has the option to disable the alternative display and play using only the electronic card display. An alternative display may include game theme graphics, spinning reels, or other imagery. The results may also be displayed on mechanical reels.

Deleted: In no instance may the
alternative display fill more
than 1/2 of the total display space.

Sec. 546.5 What are the criteria for meeting the second statutory requirement, as stated at 25 U.S.C. 2703 (7)(A)(i)(II), that bingo, lotto, or other games similar to bingo be one in which the holder of the card covers such numbers or other designations when objects similarly numbered or designated are drawn or electronically determined?

(a) In a game of bingo, the numbers or other designations used in the game must be randomly drawn or determined electronically from a non-replaceable pool containing 75 such numbers or other designations and used in the sequence in which they are drawn. Each game will permit the random draw and release or electronic determination of all numbers or designations in the pool. A common draw or electronic determination of numbers or designations may be utilized for separate games that are played simultaneously.

(b) As a variant of bingo, in an "other game similar to bingo," the numbers or other designations used in the game must be randomly drawn or determined electronically from a non-replaceable pool of such numbers or other designations which is greater than the number of spaces on the card used in the game.

(c) All numbers or other designations used in the game must be randomly drawn or electronically determined after the cards to be used in the game have been assigned to or selected by the players in the game. The cards cannot have pre-covered numbers or other designations.

(d) The numbers or other designations must be used in the sequence in which they are drawn.

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(e) To "cover," a player in a game must take overt action after numbers or designations are released. A player covers (daubs) by touching either the screen or a designated button on the player station at least one time in each round after a set of numbers or other designations is released.

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(f) Players must have an opportunity to cover (daub) after every release. Each released number or designation does not have to be covered (daubed) individually by the player, i.e., the player need not touch each specific space on the electronic bingo card where the called number or designation is located. However, the player must have the opportunity to cover (daub) by touching the screen or a designated button at least one time in each round when those numbers or other designations are released, if those numbers or other designations appear on the player's card, or the player may be given the opportunity to choose to utilize an auto-daub function if one is

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provided. Following this action by a player, the video screen at that player station will display a different color on the number or designation on that player's card, a strike-out through the space, or some other readily apparent visible characteristic if that number or designation has been properly covered (daubed) by the player. Players must be notified that they should cover (daub) their cards when the numbers or designations are revealed, or opt to use an auto-daub function, if available.

(g) Games may not include a feature whereby covering (daubing) after a release occurs automatically or without overt action taken by the player following the release; a player's selection of an auto-daub function will constitute such overt action.

(h) ~~All players in a game, and not just a winning player, must be required by the rules of the game to cover (daub) the selected numbers or other designations that appear on their card when those numbers or~~

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~~other designations are released as an indication of their participation in a common game.~~

(i) The game may not proceed until at least one player has covered (daubed) the selected numbers or other designations appearing on the player's card; provided, that at least one player's selection of an auto-daub option shall satisfy this requirement.

(j) Players must cover after each release in order to achieve any winning pattern, except that a player may later cover numbers or designations slept following a previous release ("catch up") for use in obtaining the game-winning pattern. Failure to cover after each release results in the player forfeiting use of those numbers or other designations in any other pattern in the game. For bonus prizes and progressive prizes, if a player "sleeps," i.e. fails to cover one or more numbers or other designations, that player cannot be awarded such prize based on a winning pattern which contains one or more of the numbers or other designations slept by the player. For game-winning prizes, if a player sleeps, the player may later cover the number(s) or other designations and win such prize if that player is the first player to cover all other numbers or designations making up the game-winning pattern.

(k) If a player sleeps the game-winning pattern, the game must continue until a player subsequently obtains and covers (daubs) and claims the game-winning pattern, or until expiration of a time-limit set by the game operator for claiming the game-winning pattern, which time limit shall not be less than seven (7) seconds after the ball-drop/draw in which the game-winning pattern is drawn.

(l) All numbers or other designations slept by a player must be clearly and uniquely identified as such by displaying them in a unique color, by drawing a strikeout through them, or by other readily visible means. A player who sleeps a winning pattern must be notified by visible message on the video screen that the pattern was slept. Players who fail to cover (daub) numbers or other designations that establish patterns yielding bonus or progressive prizes also must be notified by

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Comment: This requirement either is unenforceable, or would potentially slow play to an extent that the game would be unviable.

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visible message on the video screen that the pattern was slept.

(m) After all available numbers or designations that could lead to a game winning prize have been randomly drawn or electronically determined and released (i.e. no more balls could be drawn that would assist in the formation of a game winning prize), the game may allow an unlimited length of time to complete the last required cover (daub) and claim of the prize, or it may be declared void and wagers returned to players and prizes canceled.

(n) The gaming facility or its employees may not play as a substitute for a player.

Sec. 546.6 What are the criteria for meeting the third statutory requirement, as stated at 25 U.S.C. 2703 (7)(A)(i)(III), that bingo, lotto, or other games similar to bingo be "won by the first person covering a previously designated arrangement of numbers or designations on such cards?"

(a) Because the game must be won by the "first person," each game must be played by multiple players. Players in an electronic game must be linked through a networked system. The system must require a minimum of two players for each game. Games cannot begin until at least two (2) players have elected to play. Nothing in this section is intended to limit games to two players.

Deleted: but not limit participation to two players, and must be designed to broaden participation in each common game by providing reasonable and sufficient opportunity for at least six players to enter the game.

Deleted: seconds have elapsed from the time that the first player elects to play, unless six players enter.

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(b) In order for players to participate in a common game, and to meet the requirements for the minimum number of players, each player must be eligible to compete for the game-winning pattern. A game may offer players the opportunity to play at different entry wagers, and the prizes in the game may be increased, the number of interim prize-winning patterns may be increased, or a progressive prize offered, based on a higher entry wager.

Deleted: , so long as all prizes are based on achieving pre-designated winning patterns common for all players.

(c) To establish the game as a contest in which players play against one another the game must provide for revealing the results of release(s) of selected numbers or other designations only after at least

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two players have entered a game. Each release will provide one or more numbers or other designations randomly selected or electronically determined.

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The game may end when the game winning-pattern is covered (daubed) and claimed, or if not timely claimed, upon expiration of the time within which the game-winning pattern may be daubed and claimed. After the game-winning pattern is covered and claimed, there may be additional releases of randomly drawn or electronically determined numbers or other designations for a consolation prize(s).

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~~(d) During the first release, the maximum amount of numbers or characters to be revealed is one less than the number required for a game-winning pattern.~~

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(e) Each game must have one game-winning pattern or arrangement, which may be won by multiple players simultaneously. Each game-winning pattern or arrangement must consist of at least three (3) spaces, not counting any free spaces used. The game-winning

Deleted: Each release must take a minimum of two (2) seconds. Numbers or other designations must be released one at a time.

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pattern or arrangement must be available to players before the game begins.

(f) Other patterns or arrangements consisting of at least two (2) spaces each, not counting free spaces, may be used for the award of bonus or progressive prizes, if the patterns or arrangements are designated and made available to players before the game begins.

(g) Events outside the play of bingo may not be used to determine the eligibility for a prize award.

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(h) The set of selected numbers or other designations in a release may contain all of the numbers or other designations necessary to form the game-winning pattern on a card in play in the game, and also may contain the numbers or other designations necessary to form other winning patterns for bonus or progressive prizes. There may be additional releases to allow for additional bonus prizes.

Deleted: The quantity of numbers or designations in the second or subsequent release may not extend beyond the quantity of numbers or other designations necessary to form the first available eligible game-winning pattern on a card in play in the game.

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~~(i) Prizes cannot be claimed following the first release of numbers or~~

~~other designations. Two or more releases are required before a player can claim any prize in any game.~~

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(j) Bonus or progressive prizes may be awarded based on pre-designated patterns provided the award of these prizes is based on the play of bingo in the same manner as for the game-winning prize. Bonus or progressive prizes may be based on different pre-designated and pre-announced patterns, on achieving a winning pattern in a specified quantity of numbers or designations drawn or electronically determined and released, on the order in which numbers or designations are drawn or electronically determined and released, or on a combination of these criteria. Bonus or progressive prizes may be awarded as interim prizes, before or as the game-winning prize is awarded, or as consolation prizes after the game winning prize is awarded.

(k) An "ante-up" format, in which a player is required to wager before each release as a condition of remaining in the game, is permissible, provided the game maintains at least two participating players. If only one player remains after one or more releases, that player will be declared the winner of the game-winning prize, and the game will end, provided that player obtains and covers (daubs) the game-winning pattern. If all players leave the game before a game-winning pattern is obtained and covered (daubed) by a player, the game will be declared void and wagers returned to players.

(l) Each game must provide an equal chance of obtaining the game-ending pattern for each card played by an active player in the game. The probability of achieving any particular pre-designated winning pattern for a participating player in the game may not vary based on the amount wagered by that player.

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(m) The use of a payable is permitted. The order of, or quantity of, numbers or other designations randomly drawn or electronically determined may affect the prize awarded for completing any previously designated winning pattern in a game. A multiplier to the prize based on a winning pattern containing a specified number or other designation is permitted.

(n) A game-winning prize must be awarded in every game. If the first player or a subsequent player obtaining the pre-designated game-winning

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prize pattern sleeps that pattern, the game must continue until a player achieves the game-winning pattern, or until expiration of the time limit set by the operator of the game, which limit shall be at least seven (7) seconds.

The same value prize must be awarded to a subsequent game-winning player in the game.

(o) Alternative result display options may only be utilized for entertainment or amusement purposes and may not be used to independently determine a winner of the game or the prizes awarded or change the results of the bingo game in any way.

Sec. 546.7 What are the criteria for meeting the statutory requirement that pull-tabs or instant bingo not be an "electronic or electromechanical facsimile?"

(a) Every pull-tab card or instant bingo ticket must exist in a tangible medium such as paper. Hereafter, the term "pull tabs" also includes the term "instant bingo." A pre-printed pull-tab must be distributed to the player as paper, plastic, or other tangible medium at the time the pull-tab is purchased. The pull-tab presented to the player must contain the information necessary for the player to determine if that player has won a prize in the game. The information must be presented to the player in a readable format.

Comment: This entire subsection of the definition should be deleted; as long as the chances are drawn from a finite deal containing a predetermined number of winning tickets at various prize levels, and as long as multiple players have simultaneous access to the deal (but are not required actually to simultaneously participate), wholly electronic pulltab games should be considered to be Class II.

(b) A pull-tab card, whether tangible or intangible, may contain more than one arrangement of numbers or symbols, but each arrangement must comport with the requirements of this section. The player must pay for all of the arrangements on that pull-tab card in advance of its being dispensed.

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(c) Pull-tabs that exist in a tangible medium may also be sold to players with assistance of a "technologic aid" that assists in the sale. The "technologic aid" may also read and display the contents of the pull-tab as it is distributed to the player. The results of the pull-tab may be shown on a video screen that is part of or adjacent to the technologic aid assisting in the sale of the pull-tab.

(d) The player may also purchase a pull-tab from a person or from a vending unit and place the pull-tab in a separate "technologic aid" that reads and displays the contents of the pull-tab.

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(e) If pull-tabs contain multiple arrangements of numbers or numbers or symbols, the rules for game play must indicate the disposition of a pull-tab in a technologic aid that is only partially played, i.e. all arrangements have not been viewed in the technologic aid.

(f) A "technologic aid" may also show pull-tab results on a video screen using alternative displays, including game-theme graphics, spinning reels, or other imagery. The results may also be displayed on mechanical reels. Options for players found in this alternative display may not determine a winner of the game or the prizes awarded or change the results of the pull-tab

game in any way.

(g) If the pull-tab is a winning card, it must be redeemable for a prize when presented at the location in the gaming facility designated by the gaming operator, or may be accrued as a credit on the dispenser.

(h) A pull-tab may not be generated or printed at the player station.

(j) For technologic aids that are larger than the pull-tab, the machine shall prominently display the following message: "THIS IS THE GAME OF PULLTABS."

~~(k) The winning results on the pull-tab shall be no smaller than an 8 point font.~~

Sec. 546.8 When is a pull tab or instant bingo game an "electronic or electromechanical facsimile?"

~~(a) A pull tab game is an "electronic facsimile" if the pull tab does not exist in paper, plastic, or other tangible medium at the point of sale and is displayed only electronically.~~

(b) Pull-tabs that exist in a tangible medium but that are electronically or optically read and transformed into an electronic medium and made available to the player only as depictions on a video screen (and not presented directly to the player in the tangible medium) are not "electronic facsimiles."

Sec. 546.9 What is the process for approval, introduction, and verification of "electronic, computer, or other technologic aids" under the classification standards established by this part?

(a) An Indian tribe or a supplier, manufacturer, or game developer sponsored by a tribe (hereafter, the "requesting party") wishing to have games and associated "electronic, computer, or other technologic aids" certified as meeting the classification standards established by this part must submit the games and equipment to a testing laboratory recognized by the Commission under this part. The requesting party must support the submission with materials and software sufficient to establish that the game and equipment meets classification standards and provide any other information requested by the testing laboratory.

Deleted: (i) The machine cannot pay out winnings to the player, nor dispense vouchers or receipts representing such winnings.

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Comment: There is neither need nor legal justification for this requirement.

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(b) For an "electronic, computer, or other technologic aid" to be accepted as certified as meeting the classification standards under this part, the tribe shall require the following.

(1) The testing laboratory will evaluate and test the submission to the standards established by this part. Issues that concern an interpretation of the standards or the certification procedure identified during the evaluation or testing process, if any, will initially be discussed between the testing laboratory and the requesting party. In the event of impasse, the requesting party and the testing laboratory may jointly submit questions concerning the issue to the Chairman, who may decide the issue. Questions regarding additional tribal standards will be addressed to the appropriate tribal gaming regulatory authority.

(2) At the completion of the evaluation and testing process, the testing laboratory will provide a formal written report to the requesting party setting forth its findings and conclusions. The testing laboratory will also forward a copy of its report to the Commission. The report may be made available upon request to any interested tribal gaming regulatory authority by the requesting party or by the testing laboratory.

Deleted: The report shall be made available to a state in which the tribe is located upon request to the Commission by the state.

(3) Each report from a testing laboratory must state the name of the requesting party; the type of game evaluated; name(s) and version(s) of the game played with the "electronic, computer, or other technologic aid" being evaluated; all associated game themes under which the game will be played on the "technologic aid" being evaluated; findings regarding game features and manner of play; a checklist of the standards established by this part together with an indication of the results of testing and evaluation to each particular standard; and a summary conclusion as to the results of the laboratory's examination. The Tribal Gaming Agency shall determine, based upon the testing laboratory's report, whether the gaming conducted with the aid meets the requirements of this part. A supplemental report addressing additional game themes or other non-play features may follow as

necessary, and will contain a statement verifying that gaming conducted with the aid continues to meet the requirements of this part.

(4) Each report will also provide one or more unique signatures or checksum values for the operating programs used with the "electronic, computer, or other technologic aid." In the case of disk-based machines, a standard directory checking program and the data files and documentation to verify the correct operational software will be provided. In the case of EPROMs, a unique signature or checksum will be provided based upon standard algorithms. The purpose of the unique signature(s) or checksum values is to permit later verification that the games and the "electronic, computer or other technologic aids" in play in a Tribe's gaming operation(s) are the games and aids certified by the testing laboratory, by comparison of the signature(s) or checksum values.

(5) In certifying a game or "an electronic, computer, or other technologic aid" for Class II play, a requesting party or a tribe may not rely on a report from a testing laboratory owned or operated by that requesting party or that tribe.

(c) The Commission will maintain a generalized listing of games and "electronic, computer, or other technologic aids" certified by recognized testing laboratories as meeting the classification standards established by this part. Each testing laboratory will maintain a detailed listing of the "electronic, computer or other technologic

aids" it certifies. The Commission will make its listing available to the public. Any tribal gaming agency may rely upon said listing in determining whether a game so listed meets the requirements of this part. Portions of reports containing trade secrets and commercial or financial information relating to the "electronic, computer, or other technologic aid" that are considered privileged or confidential will not be made available for public review.

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its Web site

(d) Additional requirements established by a tribal gaming regulatory authority. (1) A tribal gaming regulatory authority may establish additional classification standards that extend and/or exceed the standards established by this part. It may require additional testing and certification to its own extended standards as a condition to operation of the game and associated "electronic, computer, or other technologic aid" in a gaming facility it regulates.

(2) A tribal gaming regulatory authority may elect to provide its extended testing standards to the testing laboratories and require additional tests and certification reports applicable to its own certification of a game or "electronic, computer or other technologic aid." A requesting party wishing to meet the specific tribal requirements will submit additional supporting materials and documentation to the testing laboratory as may be necessary to meet the specific tribal requirements. A testing laboratory evaluating a game and associated equipment will include in its report to the requesting party information relevant to the specific additional tribal requirements and provide a copy of the report to that tribal gaming.

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regulatory authority and the Commission.

(b) If no objection is submitted by a tribe, the Chairman or a designee will review the certifications and accompanying reports received from testing laboratories and may interpose an objection to any certification issued by a testing laboratory by notification to the testing laboratory, the requesting party, and the sponsoring tribe within 60 days of receipt of the certification and report, together with a statement of the basis for such objection.

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(c) Objections to a testing laboratory certification.

1)a) Within 30 days of receipt of the certification, a tribe may object to the certification by submitting a Notice Of Objection to the Commission. The objection shall specify the reasons why the certification is erroneous and shall include supporting documentation, if any.

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If a tribe timely objects, the Chairman or his designee shall have 60 days from receipt of the objection to concur with the objection or object to the certification.

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The Chairman or his designee will notify the testing laboratory, the requesting party and the sponsoring tribe of his concurrence or objection.

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c) If the Chairman receives no objection and does not interpose his own objection within the time allowed therefor, objection to the certification will be deemed to have been waived.

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The Chairman may object to a testing laboratory certification subsequent to the 60-day period upon good cause shown, which shall be limited to fraud or misrepresentation to the testing laboratory of any material fact upon which the laboratory based its certification, fraud or misrepresentation of any material fact by the testing laboratory, or fraud or misrepresentation by any person or entity of the results of the testing laboratory's examination of the game. If the Chairman finds good cause to object to the certification subsequent to the 60-day period, he shall do so only after providing notice to the testing laboratory, the requesting party, and the sponsoring tribe and an opportunity for a hearing.

(2) The Chairman or a designee will conduct additional discussions with the testing laboratory, the requesting party, and the sponsoring tribe on any game or "electronic, computer, or other technologic aid" to which the Chairman has objection and attempt to resolve the dispute within 30 days after receiving notice of the Chairman's objection. The

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Chairman and the requesting party and sponsoring tribe may agree to the appointment of a mediator or other third party to review the laboratory's certification and the Chairman's objection and provide a recommendation on the matter within this 30-day period. Following the discussions and receipt of the recommendation of the mediator or other third party, if any, the Chairman will decide the issue and inform the testing laboratory, the requesting party, and the sponsoring tribe of his determination.

(3) Within 30 days after receiving notice of Chairman's determination, the testing laboratory, the requesting party, or the sponsoring tribe may appeal the Chairman's objection to the full Commission by providing written notice of appeal along with documents and other information in support of the appeal. The appeal will be decided by the Commission based on the record developed by Chairman or designee and on written submissions by the testing laboratory, the requesting party, and the sponsoring tribe, unless the Commission requests additional information. The appeal will not include a hearing under Part 577 of this chapter unless directed by the Commission.

(4) If the testing laboratory, the manufacturer, or the sponsoring tribe does not appeal the Chairman's determination, or if the objection is upheld after review by the Commission following an appeal, the testing laboratory and the requesting party will notify any tribal gaming regulatory authority to which it has provided a certification and report on the game and associated equipment that the Chairman has objected to the certification and that the certification is no longer valid.

(5) An objection by the Chairman or a designee, upheld after review by the Commission, will be a final agency action for purposes of suit under the Administrative Procedure Act by the requesting party.

(f) Recognition of Testing Laboratories. (1) The Commission will

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maintain a listing of testing laboratories recognized as qualified to perform testing and evaluation for games played using "electronic, computer, or other technologic aids" that are offered for use in Class

II gaming. To obtain Commission recognition a testing laboratory will demonstrate its integrity, independence and financial stability by providing evidence of licensing obtained from a competent jurisdiction that has conducted a thorough background check of the testing laboratory.

"Competent jurisdiction" includes any tribal gaming regulatory agency of a tribe with a gaming ordinance approved by the Chairman.

(2) The testing laboratory will demonstrate its relevant technical skill and capability by providing evidence of suitable testing previously conducted for any governmental regulatory authorities, including tribal, state and/or foreign governments, and whether by the entity owning the laboratory or by personnel employed therein. The Commission will conduct an onsite review of the testing laboratory's facilities as part of its evaluation and will be satisfied that the testing laboratory is qualified and competent to perform the testing required by this part before recognizing the testing laboratory.

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(3) A testing laboratory recognized by the Commission will notify the Commission immediately if any license issued by a state, tribe or any other governmental jurisdiction is revoked or not renewed.

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(4) The Commission may offer provisional recognition to a new testing laboratory that does not meet the requirements of paragraphs (f)(1) and (2) of this section based on its own review of suitability and technical qualifications of the testing laboratory.

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Sec. 546.10 What are the steps for a compliance program administered by a tribal gaming regulatory authority to ensure that "electronic, computer, or other technologic aids" in play in Class II tribal gaming facilities meet the classification standards of this part?

(a) In regulating Class II gaming, a tribal gaming regulatory authority will institute a compliance program that ensures bingo, lotto, and other

games similar to bingo and pull-tabs and instant bingo in use in its gaming facilities, which are operated and played with "electronic, computer, or other technologic aids" required to be certified by this part meet the requirements of this part and any additional tribal standards adopted by the tribal gaming regulatory authority. The program must include the following elements:

(1) Determination by the tribal gaming regulatory authority that "electronic, computer, or other technologic aids," along with the games played thereon, required to be certified as meeting the standards established by this part, meet the standards before the equipment is placed for use in the gaming operation.

(2) Internal controls that prevent unauthorized access to game control software to preclude modifications that would cause the "electronic, computer, or other technologic aid" and the games played therewith to no longer meet the standards established by this part.

Note: Emergency changes to a game are permitted prior to certification so long as the change does not affect the classification of the game.

(3) Periodic testing of the all of the servers and a random sample of the electronic player stations to validate that the equipment continues to meet the standards established by this part.

(b) In authorizing particular Class II gaming within a gaming facility it licenses, a tribal gaming regulatory authority shall, at a minimum, require a finding and certification by an independent gaming testing laboratory, recognized by the NIGC under this Part, that each "electronic, computer, or other technologic aid" used in connection with such gaming meets the standards of this part. If the tribe's gaming regulatory authority has established classification standards that apply

additional criteria, the tribe shall require additional findings

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~~Deleted: (c) The Tribal gaming regulatory authority shall affix a seal or ¶ other label on each server and each individual client machine (player ¶ terminal) it has authorized for play under the classification standards ¶ established by this Part, indicating that all games played thereon meet ¶ the classification standards established by this Part and any ¶ additional standards established by the Tribe. The seal or other label ¶ will show the version number(s) or other unique identifier(s), as ¶ established by the manufacturer or other entity providing the game, ¶ operating software, for the games authorized for play on the equipment ¶ by the Tribal gaming regulatory authority and as documented in a ¶ certification report(s) issued by a testing laboratory. The seal or ¶ other label shall conform to the requirements for ¶ stickers(¶ established in Part 547 of this chapter. The seal or other label shall ¶ be promptly removed from the server and any individual client machine ¶ when the version number(s) of the games played thereon are changed and ¶ a new seal or other label affixed showing the versions of the game in ¶ play, provided the new version(s) meet the Classification Standards ¶ established by this Part and any additional standards established by ¶ the Tribe.~~

consistent with the additional standards as a condition to authorizing a technologic aid for use and play in gaming facility it regulates.

(d) The Tribal gaming regulatory authority shall maintain a current listing of each server, each individual client machine (player terminal), and each game program it has authorized for play under the classification standards established by this Part, indicating that all such games meet the classification standards established by this Part and any additional standards established by the Tribe. The listing will show the asset number(s) of each server and client machine (player terminal) and the version number(s) or other unique identifier(s), as established by the manufacturer or other entity providing the game operating software, for the games authorized for play as documented in a certification report(s) issued by a testing laboratory.

(e) Effective date for operation of games under the classification standards.

(1) For Class II gaming operations open on the effective date of this part or that open within twelve months of the effective date, certification of the "electronic, computer, or other technologic aids" must be completed and authorization provided by the tribal gaming regulatory authority within twelve months of the effective date. Games and associated equipment not certified within that period must be removed until certification is obtained and authorization given. The Commission Chairman may extend the period for obtaining certification for one or more periods of six months at the request of a tribal gaming regulatory authority based on good cause shown.

2) Electronic, computer, or other technologic aids that are or have been determined to be Class II by judicial decision or by advisory opinion of the Commission's Office of General Counsel are exempt from the requirements of this part for 36 months from the effective date of this part, provided that:

i) if the software in use in the technologic aid is identical in version and revision number to that identified in the opinion finding the aid to be Class II, the Tribal Gaming Regulatory Authority, shall, upon request of the

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Chairman, identify:

a) the technologic aids in use that are the subject of the exemption in this paragraph;

b) the number of such aids; and

c) the opinion determining them to be Class II.

ii) if the software in use in the technologic aid is not identical in version and revision number to that identified in the opinion finding the aid to be Class II, the Tribal Gaming Regulatory Authority shall provide to the Chairman:

a) the identity of the technologic aids in use that are the subject of this exemption;

b) the number of such aids;

c) the opinion determining them to be Class II; and

d) a report from an independent gaming laboratory that:

I) identifies and explains the features and modifications that exist in the software in use but that don't exist in the software that was the subject of the opinion, and

II) concludes that none of these additional features or modifications change the characteristics or method of play of the bingo game described in the opinion letter.

(2) For Class II gaming operations opening six months after the effective date, certification and authorization to operate by the tribal gaming regulatory authority must be completed before opening.

(3) Games played with "electronic, computer, or other technologic aids," subject to certification under this part and not in a tribe's operation prior to the effective date, must be authorized for use as Class II by the tribal gaming regulatory authority using the processes described in this Part prior to play in that tribe's gaming operation.

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Comment: To avoid disparities of opportunity, regardless of when an operation opens it should be entitled to use equipment previously certified or opined to be Class II until newly-certified equipment is commercially available.

Sec. 546.11 How long do Tribes seeking Secretarial Procedures have to come into compliance?

Deleted: How does a tribe apply for a variance from the requirements of this part

Notwithstanding any other requirements, tribes that as of the effective date of this part have a request pending before the Secretary of the Department

of Interior for secretarial procedures, as provided for in 25 C.F.R. Part 291, and that satisfy the requirements of 25 CFR 291.3, may continue to operate games and technologic aids that were in operation on January 1, 2007, for a period that terminates upon the occurrence of the earliest of the following:

- (1) The issuance of Class III procedures by the Secretary of the Department of the Interior,
- (2) A Tribal-State compact is approved by the Secretary of the Interior and is in effect, or
- (3) The passage of 36 months from the effective date of this part.

Comment: Under no circumstances should a delay in the effectiveness of either a compact or Secretarial procedures prevent a tribe from continuing to operate games that the Office of General Counsel previously has opined are Class II until certified replacement games become commercially available.